other services required under the franchise. . . ."[209] As for our duty to identify such costs "in accordance with paragraph 4 [of Section 623(B)]," that section provides:

> The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise.[210]

122. In the *Rate Order*, we determined that external costs include franchise imposed costs, i.e., the "costs of satisfying franchise requirements, including costs of satisfying franchise requirements for local, public, educational, and governmental access channels."[211] We explained that these costs "are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing."[212]

123. In response to petitions for reconsideration of the *Rate Order* seeking clarification of what constitute franchise-imposed costs, we noted that our rule essentially incorporated the language of the 1992 Cable Act, and stated that we should decide to include or exclude costs in a way that will produce equitable results for both operators and subscribers. We thus determined that only increases specifically required in the franchise documents should be accorded external treatment. This includes the costs of meeting local technical and customer service standards. We stated that this approach would permit franchising authorities and cable operators to work cooperatively to establish the costs of meeting franchise requirements that would be accorded external treatment.[213]

124. In the *Second Reconsideration Order*, we adopted the existing methodology for calculating rate adjustments based on external costs, but we did not deem it necessary to provide any further guidance as to what constitutes a franchise imposed cost.[214] However,

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[209] Section 623(b)(2)(C)(vi) of the Communications Act, as amended, 47 U.S.C. § 543(b)(2)(C)(vi).

[210] Section 623(b)(4) of the Communications Act, as amended, 47 U.S.C. § 543(b)(4). Although the legislative history discusses the provision as it applies to PEG services, it does not address the meaning of "other services required under the franchise." *See* H. Rep. 628, 102d Cong., 2d Sess. 84 (1992).

[211] *Rate Order*, 9 FCC Rcd at 5790.

[212] *Id.*

[213] *First Reconsideration Order*, 9 FCC Rcd at 1220 (footnotes omitted).

[214] *Second Reconsideration Order*, 9 FCC Rcd at 4200-04.

comments supporting and opposing petitions for reconsideration of the *Second Reconsideration Order* reveal differences of opinion as to this subject.

B. Contentions

125. NATOA, in its Petition for Reconsideration of the *Second Reconsideration Order and Third Reconsideration Order*, urges us to clarify what is meant by "[c]osts of complying with franchise requirements," as that term is used in Section 76.922(d)(3)(iv)(B) of our rules.[215] NATOA also seeks clarification as to the precise manner in which cable operators may pass through these costs. NATOA states that addressing this issue could "minimize disputes between a franchising authority or the Commission and a cable operator, and [could] prevent unwarranted surcharges on regulated rates." For example, NATOA argues that a provision in a franchise agreement that the cable system be operated "in a safe and reasonable manner" can lead to disputes if the operator, citing this provision, attempts to pass through as external costs the expenses related to routine system maintenance necessary to operate the system "in a safe and reasonable manner." Likewise, NATOA claims that a cable operator might extend its trunk line in order to reach more subscribers and increase its profits, but then claim the cost of the line extension as an external cost eligible for pass through treatment because its franchise requires the operator to provide service to any person requesting service in any area where it is "feasible" for the company to provide service.[216]

126. In sum, NATOA argues that it would be inconsistent with the goals of the 1992 Cable Act to permit a cable operator to pass though costs that the operator would have incurred "to maintain a first-class competitive business" even in the absence of any franchise requirements.[217] As described in its petition for reconsideration of the *Rate Order*, NATOA again suggests that franchise-related costs accorded external treatment should include only new or additional direct monetary costs which are specifically enumerated by a stated dollar amount in a franchise agreement to satisfy franchise requirements imposed by the franchising authority, or specifically attributable to a specific new or additional franchise requirement imposed by the franchising authority. However, such costs should not include normal types of business costs other companies incur in doing business with a jurisdiction, the costs of keeping pace with current technological developments in the cable industry, or the costs of remaining competitive in the marketplace.[218]

127. NCTA disputes NATOA's suggestion as overly narrow and inconsistent with

215 NATOA Petition for Reconsideration at 4.

216 *Id.* at 4-5.

217 *Id.* at 6.

218 *Id.* at 6.

our previous analysis of franchise-imposed costs.[219] NCTA claims that further clarification of our analysis of this issue, as described in the *First Reconsideration Order*, is unnecessary, stating that "[W]hat is and should remain relevant to a determination of whether certain costs are external is whether the services are specifically required in a franchise and whether the costs for providing those services have increased."[220]

128. Viacom International Inc. ("Viacom") argues that NATOA's proposal runs counter to our goal, as stated in the *First Reconsideration Order*, that franchising authorities and cable operators work cooperatively to assess the costs and benefits of various franchise requirements.[221] According to Viacom, there is no justification for the distinction drawn by NATOA between franchise imposed costs to which the parties assign a specific dollar amount and other such costs for which no such dollar amount is assigned.[222] Viacom also argues that by embracing only "new or additional" costs and burdens, the NATOA proposal appears, allegedly without justification, to apply only to franchise agreements made after enactment of the 1992 Cable Act.[223]

129. Howard & Howard stated that if the Commission is going to clarify what is meant by franchise requirement costs, it should ensure that the clarification defines franchise requirement costs as including a number of different costs that are required by franchise agreements. First, Howard & Howard stated that increases in costs associated with requirements that an operator wire private educational institutions should be included as external cost pass throughs. In addition, it stated that the Commission should clarify that the cost increases related to providing any type of cable services to any public facility or institution should receive external cost treatment. Also, Howard & Howard recommended that if a franchise required an operator to remove aerial facilities and place them underground, the operator should be permitted to pass through such relocation costs to subscribers.[224]

130. In reply comments, GTE Service Corporation ("GTE") agrees with NATOA that clarification of this issue is necessary to ensure cable operators do not attempt to claim as external "any cost that may be remotely associated with the requirements that local

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[219] NCTA Opposition at 2-4.

[220] *Id.*

[221] Viacom Opposition at 6, quoting *First Reconsideration Order*, 9 FCC Rcd at 1220.

[222] *Id.*

[223] *Id.*

[224] Howard & Howard at 2-3.

franchise authorities may impose."[225]

131. The parties also disagree as to the timing of the pass though of franchise-imposed costs, however they are defined. NATOA argues that the operator should be required to spread such costs evenly throughout the franchise term to prevent the operator "from overestimating increases in such costs in any quarter it files the FCC Form 1210 . . . ."[226] NCTA responds that a cable operator should be entitled to recover its costs immediately if the franchise requires the operator to incur those costs all at once.[227]

C. Discussion

132. On reconsideration, we believe that operators should be permitted to include increases in franchise requirement costs that the operator would not have incurred in the absence of the franchise requirement. Such increases include both new requirements that the franchising authority imposes and increases in the cost of complying with existing requirements. Our current rules permit external cost treatment for increases in the cost of satisfying franchise requirements for (a) PEG access channels, (b) public, educational, and governmental access programming, and (c) customer service standards and technical standards that exceed federal requirements. In our view, such increased costs would not have been incurred in the absence of a franchise agreement because we believe that the operator would not have chosen to provide such services.

133. We believe that operators also should be permitted to pass through increases in the costs of institutional networks and the provision of video services, voice transmissions and data transmissions to or from governmental institutions and educational institutions, including private schools, to the extent such services are required by the franchise agreement. We believe that such costs should be afforded external cost treatment because we believe that operators generally would not provide such services in the absence of a franchising requirement. Because such costs are largely beyond the control of the cable operator, we believe they should be passed on to subscribers without a cost-of-service showing.

134. In addition, under certain circumstances, we will permit operators to pass through to subscribers the cost of meeting franchise requirements that they remove aerial facilities and place them underground. However, the external cost pass through should be limited to cases where the operator has been required to actually remove cable from utility poles and place the same cable underground. We do not believe that external cost treatment should be afforded in cases where the franchise agreement requires the operator to place new

[225] GTE Reply Comments at 4.

[226] NATOA Comments at 6.

[227] NCTA Opposition at 4.

cable facilities underground because we believe that this is a cost associated with a rebuild or an upgrade of the cable system and we have determined that we will not permit external cost treatment of upgrades or rebuilds.[228] Moreover, costs associated with placing cable underground in these circumstances are costs that the operator could have incurred in absence of the franchise requirement as a result of the upgrade or rebuild.

135. We believe that increased costs resulting from normal maintenance or from a simple expansion of service within the franchise area should not be subject to external treatment. An operator may not pass through the costs associated with expanding the reach of its cable system even if such expansion is contained in the franchise documents. Accordingly, we reject NCTA's suggestion that external cost treatment should be imposed as long as the service is "specifically required" in the franchise agreement. Such a formulation of the rule could encompass costs that the cable operator could have incurred even in the absence of a specific franchise requirement[229] or would be obligated to incur under pre-existing federal standards.[230] We reject NATOA's suggestion to allow only obligations enumerated in a franchise agreement by a specific dollar amount as unduly complicating franchise negotiations. This would require parties to specify the costs of providing certain services or facilities where such costs may not be certain when the contract is negotiated.

136. As for the timing of the pass throughs of these costs, the operator will be required to amortize the cost of franchise imposed capital expenditures over the useful life of the items. We find such treatment appropriate because current subscribers should not be required to pay all costs associated with a service that will benefit future ratepayers as well. Consistent with interim rules governing cost-of-service showings, we find that operators will be permitted to recover an 11.25% rate of return on this investment.

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[228] *Rate Order*, 8 FCC Rcd at 5791-92 n.608; *First Reconsideration Order*, 9 FCC Rcd at 1216; *Second Reconsideration Order*, 9 FCC Rcd at 4240-41 n.340. Operators are permitted to recover the costs of significant upgrades to their systems with a streamlined cost-of-service showing. *Cost of Service Order*, 9 FCC Rcd at 4674-76.

[229] For example, a cable system that chooses to offer service in a portion of a franchise area that is not required under the franchise agreement could not pass through the costs of that simple expansion as an external cost related to franchise requirements.

[230] In its petition for reconsideration, the Public Interest Petitioners urge that we permit operators to pass through network upgrade costs, even if the franchise did not require it to perform the upgrade. Public Interest Petitioners Petition for Reconsideration at 15; see also A & E Comments at 19. We will not reconsider this issue at this time, however, because we previously rejected arguments in favor of external cost treatment for network upgrades in both the *Rate Order* and the *Second Reconsideration Order*. In the *Second Reconsideration Order*, we stated that "we will not establish, or further consider in this proceeding external cost treatment for upgrades generally, or for upgrades required by local franchising authorities." *Second Reconsideration Order*, 9 FCC Rcd at 4241 n.340.

V. ADVERTISING OF RATES

A. Background

137. Section 622(c) of the Communications Act provides that cable operators may separately identify each of the following charges on their bills to subscribers: (a) the amount assessed as a franchise fee (as well as the identity of the franchising authority); (b) the amount of the bill assessed to satisfy any franchise agreement imposed on the operator for costs related to PEG channels; and (c) the amount attributable to any charges a governmental authority imposes on the transaction between the operator and the subscriber.[231] In the *Rate Order*, we determined that, although operators are permitted to itemize these charges on subscribers' bills, operators are not permitted to separately bill subscribers for such charges.[232] We stated that any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total for which must include all fees and costs itemized pursuant to Section 622(c).[233]

138. Consistent with this approach, the *Rate Order* also prohibited cable operators from advertising a rate for cable service that did not include the costs that were itemized pursuant to Section 622(c) of the Communications Act.[234] The Commission reasoned that if operators were not required to advertise the total rate, including itemized costs, it would result in needless confusion for subscribers.[235]

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[231] Section 622(c) of the Communications Act, as amended, 47 U.S.C. § 542(c).

[232] *Rate Order*, 8 FCC Rcd at 5971-5972. We stated that, if we permitted operators to require subscribers to remit separate payments for the items listed in Section 622(c), it would impose an unnecessary burden on subscribers. We also said that listing such charges "below the line" would confuse subscribers as to what is part of their bills. *Id.*

[233] *Id.* This requirement is consistent with the House Report which states that:

> The cable operator shall not identify cost itemized pursuant to section [622(c)] as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be included as a part of the total amount a cable operator charges a cable subscriber for cable service.

House Report at 86.

[234] *Rate Order*, 8 FCC Rcd at 5972 n.1415.

[235] *Id.*

139. In the *Third Reconsideration Order*, we made an exception to this requirement for cable systems that cover multiple franchise areas and have different franchise fees, different franchise requirement costs, different channel line-ups, or slightly different rate structures. We determined that such systems should be permitted some flexibility in designing region-wide advertising that will reasonably advise potential subscribers of the total rate for cable service. We decided that where a cable system covers multiple franchise areas, the operator may advertise a range of fees or a "fee plus" rate that takes account of variations in the itemized costs throughout the franchise area. We said that under these circumstances, an operator need not indicate the total rate for each individual franchise area. An operator's advertisement might declare, for example, "that basic service is $14.00 per month plus a franchise fee of $0.28 to $0.70, depending on location, or that it is $14.28 to $14.70, depending on the location."[236]

B. Contentions

140. Local Governments seek reconsideration of our decision to adopt the "fee plus" approach for systems serving multiple franchise areas.[237] Local Governments assert that the fee plus approach violates the intent of Section 622(c) of the Communications Act and is inconsistent with the Commission's subscriber bill itemization rules because it permits operators to advertise by separating the rate for cable service from the franchise fee cost.[238] Local Governments state that they do not question the appropriateness of permitting operators to advertise a range of rates, provided that each rate in the range includes the franchise fee.[239]

141. Local Governments argue that the "fee plus" approach would violate the intent of the 1992 Cable Act because the legislative history demonstrates that "it was not the intent of Congress to allow operators to add franchise fees or other Section 622(c) charges to subscribers' bills in addition to regular charges for cable service."[240] Local Governments also assert that the "fee plus" approach is inconsistent with the Commission determination in the *Rate Order* that "any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total of which must include all fees and costs itemized pursuant to Section 622(c)."[241]

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[236] *Third Reconsideration Order*, 9 FCC Rcd at 4368 n.99.

[237] NATOA Petition for Reconsideration at 7-13.

[238] *Id.* at 7.

[239] *Id.* at 7-8.

[240] *Id.* at 8-9.

[241] *Id.* at 10, *quoting Rate Order*, 8 FCC Rcd at 5971-5972.

142. Local Governments also complain that the Commission's "fee plus" example suggests that the Commission misunderstands the amount on which franchising authorities may assess franchise fees pursuant to Section 622(b) of the Communications Act. Local Governments assert that in the example, the Commission effectively treats the franchise fee as a tax on top of the basic rate and that this would give franchising authorities less than they would be entitled to under Section 622(b) of the Communications Act.[242]

143. The City of Detroit supports Local Governments' petitions because it believes that the "fee plus" approach will allow operators to advertise their rates in violation of the intent of Section 622(b) of the Communications Act and would suggest that cable operators can itemize their franchise fees in a manner that would deprive franchising authorities of the full 5% of gross annual revenues.[243]

144. In response, NCTA argues that the Commission's "fee plus" approach would not confuse potential subscribers about what amount they would have to pay cable operators for their total monthly bill. NCTA states that Local Governments' objection to the "fee plus" approach appears to be "a continuation of their effort to keep cable subscribers in the dark as to what portion of their bill is attributable to the fees paid to the local franchising authority."[244]

145. Time Warner Entertainment Company ("Time Warner") argues that the subscriber bill itemization requirements in Section 622(c) of the Communications Act do not attempt to control the format or the content of a cable operator's advertisement. According to Time Warner, the purpose of Section 622(c) is to prevent cable operators from separately billing customers for franchise and other governmentally imposed fees. As long as customers are only required to remit one periodic payment for cable service, Time Warner states, cable operators are free to advertise governmental fees separately. Time Warner also argues that advertising is protected commercial speech under the First Amendment and that neither Congress nor the Commission has the authority to regulate the advertiser's freedom of speech under these circumstances. Time Warner also argues that if cable operators were required to advertise separate rate schedules for each community based solely on differences in the franchise fee, system-wide advertising would be virtually impossible and consumer confusion would result.[245]

C. Discussion

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[242] *Id.* at 10-12.

[243] Response of City of Detroit at 2-4.

[244] NCTA Comments at 4-6.

[245] Time Warner Opposition at 3-6.

146. On reconsideration, we continue to believe that cable system operators covering multiple franchise areas that have different franchise fees, franchise costs, channel line-ups, or rate structures should be permitted to use the "fee plus" approach when they advertise their rates. We find that the "fee plus" approach provides operators that cover multiple franchise areas the flexibility to efficiently advertise their services to consumers. We disagree with Local Governments' assertion that the "fee plus" approach violates Section 622(c) of the Communications Act. Section 622(c) permits operators to itemize certain fees imposed by franchise and governmental authorities. While operators are allowed to itemize certain fees on a subscribers bill, Congress intended that cable operators only be permitted to require one payment from subscribers for services. We find that because the "fee plus" approach only addresses how an operator serving multiple franchise areas may advertise services, it is not related to the operator's billing practices and does not, therefore, violate the intent of Section 622(c). Moreover, we believe that the "fee plus" approach is consistent with the spirit of the subscriber bill itemization requirements in Section 622(c) of the 1992 Cable Act and Section 76.985 of the Commission's rules because it permits operators to inform consumers of the amount of franchise fees without confusing them as to the total cost of cable service.

147. We believe that operators should be permitted to advertise their rates using either of the methods described above because both methods of advertising reasonably informs potential subscribers of the true price of cable service. This approach is consistent with the Commission's goal of enhancing industry's flexibility in making business and marketing decisions wherever reasonably possible. Therefore, we affirm our decision to allow cable systems that cover multiple franchise areas to advertise a range of fees or a "fee plus" rate that take account of variations in the itemized costs throughout the franchise area.

148. Although Local Governments' are concerned that the "fee plus" approach may result in a reduction in the amount of franchise fees that franchising authorities may assess, we decline to address this matter in this Order. The Cable Services Bureau has issued a decision regarding the proper assessment of franchise fees,[246] and is currently reviewing a number of petitions for reconsideration filed in response to that decision.[247]

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[246] United Artists Cable of Baltimore, DA 95-737 (Apr. 6, 1995).

[247] *See, e.g.*, Petition for Reconsideration of the City of Baltimore, Maryland, NATOA, the National League of Cities, and the City of New York, New York (May 8, 1995); Petition for Reconsideration of the City of Dallas, Texas, the City of Dubuque, Iowa, the City of Indianapolis, Indiana, the City of Laredo, Texas, Montgomery County, Maryland, the Miami Valley Cable Council, Ohio, the City of St. Louis, Missouri, and the City of Tallahassee, Florida (May 8, 1995). *See also* Public Notice, *Commission Applies "Permit but Disclose" Ex Parte Rules to Reconsideration of United Artists Cable of Baltimore*, DA 95-1366 (June 19, 1995).

VI. FRANCHISE FEE REFUNDS

A. Background

149. Section 622(b) of the Communications Act provides that a cable operator's franchise fees for any 12-month period shall not exceed 5% of the operator's gross annual revenues. In the *Third Reconsideration Order*, we found that when an operator is required to refund subscribers for overcharges, the franchise fee must be reduced because the refund caused a reduction in the operator's gross annual revenues. We found that where a refund has been ordered, franchising authorities must return to the cable operator the amount of a franchise fee that has been overpaid as a result of the reduction in the operator's gross annual revenues. We stated that the franchise fee overcharge may be returned to the operator by either deducting the amount from future franchise fee payments or by having the franchising authority return it in an immediate lump sum payment.[248]

B. Contentions

150. NATOA seeks clarification as to whether the franchising authority or the cable operator has the discretion to determine whether franchise fee overpayments will be returned to the operator by an immediate lump sum payment or by deducting the amount from the cable operator's future franchise fee payments. NATOA argues that the Commission should permit franchising authorities to choose the method of returning the overpayment because a private entity should not be permitted to order a governmental entity to take certain actions. In addition, NATOA argues that in determining how franchise fee overpayments are refunded to cable operators, franchising authorities should receive the same discretion that operators have in determining how to implement refunds to subscribers. NATOA states that because operators have the discretion to implement a refund to subscribers by check or as a credit to a customer's bill, franchising authorities should have the discretion to determine whether to refund franchise fee overcharges or to offset overcharges against future franchise fee payments.[249]

151. In response, NCTA argues that it is the federal government and not a private entity that has established the rules governing the return of overcharges. NCTA states that, once operators have given full refunds or credits to subscribers, it is only fair that operators have the choice of immediately obtaining an up-front, lump payment for the franchise fee overcharge.[250]

C. Discussion

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248 *Third Reconsideration Order*, 9 FCC Rcd at 4354.

249 NATOA Petition/Comments at 14-16.

250 NCTA Comments at 8.

152. On reconsideration, we find that franchising authorities may determine whether a franchise fee overpayment is to be returned to the cable operator in one lump sum payment or by offsetting the overcharges against future franchise fee payments, provided that the overcharges are returned to the operator within a reasonable period of time. We recognize that in most instances, the operator holds franchise fees on behalf of the franchising authority for lump sum payment at the end of an agreed upon period. In those situations, the operator should offset the overpayments against the franchise fees it then holds. In the rare instances where the overpayments are very large, the franchising authority has the discretion to determine a reasonable repayment period plus interest. Because we have already determined that 11.25% is presumptively the cable operator's cost of capital,[251] we find that the interest rate presumptively should be 11.25%.

153. We agree with NATOA that franchising authorities should have the discretion to determine the means by which overpayments are to be returned to cable operators because it would be inappropriate to permit cable operators to dictate how the franchising authority should recompense operators. Moreover, in certain cases, the franchise fee overpayment may have been spent before it has been determined that an overpayment has been made and the franchising authority may not have the funds to immediately return the overpayment. However, we also believe that operators are entitled to receive interest on any franchise fee overpayments if franchising authorities delay returning overpayments to operators and that, in any case, operators should have overpayments returned within a reasonable period of time. We find that the meaning of "reasonable period of time" is dependent upon the amount of the overcharge and the relationship it bears to a franchising authority's budget. That is, the larger the absolute amount of the overpayment and the larger its amount in relation to a franchising authority's budget, the longer the franchising authority may need either to credit the operator for future franchise fee payments or to make a lump sum payment to the operator. We believe that this approach balances the franchising authority's need to have discretion in determining the means by which overcharges are returned with the operator's need to have such overcharges returned within a reasonable period of time.

VII. REGULATORY REVIEW OF EXISTING RATES

A. Background

154. Section 623(c) of the 1992 Cable Act requires that, upon the receipt of specific complaints regarding a CPST, the Commission must ensure that such rates are not unreasonable.[252] Under our rules, we review CPST complaints in the event that a cable operator increases its rates for CPS, provided that such complaints make a minimum

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[251] *Cost-of-Service Order*, 9 FCC Rcd at 4633-4635.

[252] 1992 Cable Act § 3(c), 106 Stat. at 1468-69.

showing[253] and are filed with the Commission within 45 days of the date the subscriber receives a bill from the cable operator reflecting the rate increase.[254]

155. The 1992 Cable Act provided an exception to the general rule that complaints may be filed only against a CPST rate increase. The exception permitted subscribers and franchising authorities to file complaints regarding CPST rates that existed as of the effective date of our rules within 180 days following the implementation of the initial rate regulations on September 1, 1993. Following the expiration of this initial 180 day period on February 28, 1994, complainants were not permitted to challenge rates that were in effect on September 1, 1993.[255] Complaints filed after February 28, 1994 were valid only if a cable operator raised its rate and the complainant filed within 45 days from the date the subscriber received a bill.

156. In the *Rate Order*, we determined that for complaints filed no later than February 28, 1994, the operator's refund liability would equal the difference between the disputed rate and the rate determined by the Commission to be not unreasonable under either the benchmark formula or pursuant to a cost-of-service proceeding. We stated that when an operator's initial rate as of September 1, 1993 was not challenged within the 180 day period, i.e., by February 28, 1994, the operator would not face refund liability for its existing rate. Instead, upon the Commission's receipt of a valid complaint filed within 45 days of a rate increase, the refund would be limited to the difference between an operator's disputed rates and its unchallenged rates in existence as of the effective date of our rules.[256]

157. However, in footnote 907 of the *Rate Order*, we stated that this exception does not apply to prospective rate reductions. We stated that:

> [I]f we conclude that an operator's subsequent rate increase is unreasonable (but its existing rate as of the effective date of our rules was not challenged), we will employ our standard procedures for designating a reasonable rate that the cable operator must charge on a prospective basis. Because of the prospective nature of this remedy, Section 623(c)(3) does not preclude designation of a reasonable, prospective rate below the cable operator's existing rate as of the effective date of our rules.[257]

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[253] 47 C.F.R. § 76.954 (1993).

[254] 47 C.F.R. § 76.953(b) (1993).

[255] Communications Act, § 623(c)(3); 47 U.S.C. § 543(c)(3).

[256] *Rate Order*, 8 FCC Rcd at 5866.

[257] 8 FCC Rcd 5866 n.907. Moreover, the Cable Services Bureau clarified that for CPST complaints filed after February 28, 1994, "the Commission will consider the total rate and not just the most recent rate increase." *See* News Release, Min. No. 4173 (rel.

B. Contentions

158. On reconsideration, Public Interest Petitioners (Dr. Everett Parker and Mr. Henry Geller, Esq.) and United Video argue that the Commission's rules improperly permit rate changes to trigger challenges to an operator's entire rate in violation of the 1992 Cable Act.[258] They and other petitioners also argue that the current complaint process deters operators from adding new programming since rate increases may lead to a subscriber rate complaint which would subject the operator to a review of the entire CPST rate.[259]

159. Public Interest Petitioners also argue that the complaint process violates the 1992 Cable Act and legislative history since the reexamination of the entire rate for CPSTs would nullify the time limits imposed by Congress.[260] Public Interest Petitioners and United Video recommend establishing a complaint process that reviews only the increase in CPST rates and not the entire rates.[261]

160. NATOA asserts that the Commission has correctly interpreted the statute, noting that Section 623(c)(3) of the Communications, which established the window for challenging existing rates, does not limit the Commission's authority to establish rules that permit a regulatory review of the overall reasonableness of rates in the context of a rate increase.[262]

C. Discussion

161. On our own motion,[263] we have decided to end regulatory review of the

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February 9, 1994).

[258] Public Interest Petitioners Petition at 13; United Video Petition at 9.

[259] United Video Petition for reconsideration at 9; Public Interest Petitioners Petition for Reconsideration at 12-13; Providence Journal Response to Fifth NPRM at 19; Viacom Comments on Fifth NPRM at 18; Court TV Comments at 9, 16; Discovery Comments at 10-11; NCTA Comments on Fifth NPRM at 10.

[260] Public Interest Petitioners Petition for Reconsideration at 13.

[261] *Id.*; United Video Petition at 9.

[262] NATOA Opposition to Petitions for Reconsideration at 7-8.

[263] Although Public Interest Petitioners filed in response to the *Second Reconsideration Order*, this matter was not addressed there. Thus, we act on our own motion rather than respnd to its Petition. *See* note 1, *supra*.

operator's entire rate structure when we receive future CPST rate complaints.[264] Operators that have never been subject to CPST rate regulation will not face Commission review of their entire rate structure if a complaint is filed after the effective date of these rules. Complaints filed after the effective date of these rules on subsequent CPST rate changes must be filed with the Commission within 45 days of the date subscribers receive a bill reflecting the operator's next CPST rate increase, and will result in Commission review of only the amount of the rate increase complained about.

162. Although Commission review will be so limited, in order to meet its burden of showing that its CPST rates are not unreasonable,[265] the operator nevertheless may have to provide the Commission with details about its previous increases where no earlier filing provides those details. For example, an operator that attempts to use the new Going Forward method for channel additions[266] in its current filing may need to demonstrate that its current increase, in conjunction with its previous rate increases, does not exceed the operator's cap. As another example, if no complaint was filed for the operator's relevant earlier rate adjustments, an operator that adjusts its rates using the annual rate adjustment method[267] should provide the projections on which the operator's previous rates were based so that the Commission can review the operator's true up in its current filing.

163. We are eliminating review of an operator's entire rate structure because we find that continuing this policy creates an uncertain business environment for cable operators that have not had their CPSTs subject to rate regulation. We are concerned about this because an uncertain business environment may generally discourage investment, without which operators may lack the resources to upgrade their networks, add new programming services, and provide new innovative services.

164. We find that, if no rate complaint is filed prior to the effective date of these rules, the operator's initial CPST rates under regulation are not unreasonable. In our view, subscribers and franchising authorities have had ample opportunity to file a complaint that would result in Commission review of operators' entire rate structure. It has been nearly two years since subscribers and franchising authorities first had the opportunity to complain about their CPST rates. Since September 1, 1993, subscribers had an initial 180 day period to complain about initial CPST rates. If they missed the opportunity to complain during this initial 180 day period, they could have complained about any subsequent rate increase and that would have triggered a review of the operator's entire rate structure. We believe that if

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[264] In resolving a complaint pending on the effective date of these rules, we will review an operator's entire rate structure in addition to any rate increases.

[265] 47 C.F.R. § 76.956(b).

[266] 47 C.F.R. § 76.922(e)(3).

[267] *See* Section II, *supra*.

subscribers and the franchising authority have not filed a CPST rate complaint, it indicates a level of satisfaction with their current rates that would not exist if they believed CPST rates were unreasonable. We also believe that the Commission can fulfill its responsibility to ensure that CPST rates are not unreasonable when only reviewing rate changes.

VIII. REGULATORY FLEXIBILITY ACT ANALYSIS

A. Final Analysis for the Thirteenth Reconsideration Order

165. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the *Thirteenth Order on Reconsideration* is as follows:

166. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

167. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Rate Order*. The SBA also filed reply comments in response to the *Fifth Notice*. The Commission addressed those comments in the Fifth Report and Order.

168. Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. In this proceeding, the Commission has attempted to accommodate the concerns expressed by these parties. For example, the revised rules permitting the expedited pass through of certain external costs are designed to reduce administrative burdens on industry. In addition, the revised rules permitting operators to recover the full portion of previously incurred increases in external costs are designed to maintain and enhance incentives for cable operators to achieve efficiency cost savings and reduce administrative burdens on both industry and regulators. Finally, the *Order* further reduces burdens by clarifying rules concerning the advertising of rates, the refunds of franchise fees, and the costs related to franchise requirements.

IX. PAPERWORK REDUCTION ACT

169. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information

collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

X. ORDERING CLAUSES

170. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Thirteenth Order on Reconsideration, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth below.

171. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

172. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective thirty (30) days after publication in the Federal Register, except that new reporting requirements shall take effect thirty (30) days after approval by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

Appendix A

Petitions for Reconsideration of the Second/Third Reconsideration Orders

Public Interest Petitioners

United Video

Encore Media Corporation

Commissioner of Baseball

Eternal Word Television Network (EWTN)

Viacom International Inc.

Bell Atlantic

National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, the National Association of Counties and the City of New York

Comments/Oppositions to Petitions for Reconsideration

Liberty Media Corporation (Comments)

Continental Cablevision, Inc. (Response to Petitions for Reconsideration)

A&E and ESPN (Comments in Support of Petitions for Reconsideration)

GTE Service Corporation (Comments to Petitions for Reconsideration)

Small Cable Business Association (SCBA)

National Cable Television Association, Inc. (Comments)

Times Mirror Company (Comments)

Program Providers, Ovation, Inc. and PBS Horizons Cable Network (Comments)

Discovery Communications, Inc. (Opposition)

Viacom International Inc. (Opposition)

National Association of Telecommunications Officers and Advisors and the city of New York (Opposition)

Time Warner Entertainment Co. L.P. (Opposition)

National Cable Television Association, Inc. (Opposition)

City of Detroit (Response in support of NATOA's Petition for Reconsideration)

Bell Atlantic (Opposition)

National Cable Satellite Corporation/C-Span

Replies

Bell Atlantic

Fox Basic Cable, Inc. (fX)

Public Interest Petitioners

GTE Service Corporation

United Church of Christ

Petitions for Reconsideration of the Fourth Reconsideration Order

TKR Cable Company, Inc.

City of New York and National Association of Telecommunications Advisors and Officers

Comments/Oppositions to Petitions for Reconsideration

City of New York and National Association of Telecommunications Advisors and Officers (Opposition to TKR Petition for Reconsideration)

Cable Telecommunications Association, Inc. (Comments in Support of TKR Petition for Reconsideration)

National Cable Satellite Corporation, Inc./C-Span (Ex parte support for TKR Petition for Reconsideration)

National Cable Television Association, Inc. (Opposition to City of New York and NATOA's Petition for Reconsideration)

APPENDIX B

RULE CHANGES

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. The AUTHORITY citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. s 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. 532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. 532, 533, 535, 543, 552.

2. Section 76.922 is amended by redesignating paragraphs (e) through (k) as paragraphs (g) through (m), respectively, revising paragraph (c)(d) and (f), and newly redesignated paragraphs (g)(h)(i)(j)(k)(l)(m) and adding paragraphs (e) and (f), to read as follows:

§ 76.922 Rates for the basic service tier and cable programming services tiers.

*****

(c) Subsequent permitted charge.

(1) The permitted charge for a tier after May 15, 1994 shall be, at the election of the cable system, either (A) a rate determined pursuant to a cost-of-service showing, (B) a rate determined by application of the Commission's price cap requirements set forth in paragraph (d) of this section to a permitted rate determined in accordance with paragraph (b) of this section, or (C) a rate determined by application of the Commission's price cap requirements set forth in paragraph (e) of this section to a permitted rate determined in accordance with paragraph (b) of this section.

(2) The Commission's price cap requirements allow a system to adjust its permitted charges for inflation, changes in the number of regulated channels on tiers, or changes in external costs. After May 15, 1994, adjustments for changes in external costs shall be calculated by subtracting external costs from the system's permitted charge and making changes to that "external cost component" as necessary. The remaining charge, referred to as the "residual component," will be adjusted annually for inflation. Cable systems may adjust their rates by using the price cap rules contained in either paragraph (d) or (e) of this section.

(3) An operator may switch between the quarterly rate adjustment option contained in paragraph (d) of this section and the annual rate adjustment option contained in paragraph (e) of this section, provided that:

(i) Whenever an operator switches from the current quarterly system to the annual system, the operator may not file a Form 1240 earlier than 90 days after the operator proposed its last rate adjustment on a Form 1210; and

(ii) When an operator changes from the annual system to the quarterly system, the operator may not return to a quarterly adjustment using a Form 1210 until a full quarter after it has filed a true up of its annual rate on a Form 1240 for the preceding filing period.

(4) An operator that does not set its rates pursuant to a cost-of-service filing must use the quarterly rate adjustment methodology pursuant to paragraph (d) of this section or annual rate adjustment methodology pursuant to paragraph (e) of this section for both its basic service tier and its cable programming services tier(s).

(d) Quarterly rate adjustment method.

(1) Calendar year quarters. All systems using the quarterly rate adjustment methodology must use the following calendar year quarters when adjusting rates under the price cap requirements. The first quarter shall run from January 1 through March 31 of the relevant year; the second quarter shall run from April 1 through June 30; the third quarter shall run from July 1 through September 30; and the fourth quarter shall run from October 1 through December 31.

(2) Inflation Adjustments. The residual component of a system's permitted charge may be adjusted annually for inflation. The annual inflation adjustment shall be based on inflation occurring from June 30 of the previous year to June 30 of the year in which the inflation adjustment is made, except that the first annual inflation adjustment shall cover inflation from September 30, 1993 until June 30 of the year in which the inflation adjustment is made. The adjustment may be made after September 30, but no later than August 31, of the next calendar year. Adjustments shall be based on changes in the Gross National Product Price

Index as published by the Bureau of Economic Analysis of the United States Department of Commerce. Cable systems that establish a transition rate pursuant to paragraph (b)(4) of this section may not begin adjusting rates on account of inflation before April 1, 1995. Between April 1, 1995 and August 31, 1995 cable systems that established a transition rate may adjust their rates to reflect the net of a 5.21% inflation adjustment minus any inflation adjustments they have already received. Low price systems that had their March 31, 1994 rates above the benchmark, but their full reduction rate below the benchmark will be permitted to adjust their rates to reflect the full 5.21% inflation factor unless the rate reduction was less than the inflation adjustment received on an FCC Form 393 for rates established prior to May 15, 1994. If the rate reduction established by a low price system that reduced its rate to the benchmark was less than the inflation adjustment received on an FCC Form 393, the system will be permitted to receive the 5.21% inflation adjustment minus the difference between the rate reduction and the inflation adjustment the system made on its FCC Form 393. Cable systems that established a transition rate may make future inflation adjustments on an annual basis with all other cable operators, no earlier than October 1 of each year and no later than August 31 of the following year to reflect the final GNP-PI through June 30 of the applicable year.

(3) External costs.

(i) Permitted charges for a tier may be adjusted up to quarterly to reflect changes in external costs experienced by the cable system as defined by paragraph (f) of this section. In all events, a system must adjust its rates annually to reflect any decreases in external costs that have not previously been accounted for in the system's rates. A system must also adjust its rates annually to reflect any changes in external costs, inflation and the number of channels on regulated tiers that occurred during the year if the system wishes to have such changes reflected in its regulated rates. A system that does not adjust its permitted rates annually to account for these changes will not be permitted to increase its rates subsequently to reflect the changes.

(ii) A system must adjust its rates in the next calendar year quarter for any decrease in programming costs that results from the deletion of a channel or channels from a regulated tier.

(iii) Any rate increase made to reflect an increase in external costs must also fully account for all other changes in external costs, inflation and the number of channels on regulated tiers that occurred during the same period. Rate adjustments made to reflect changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient information to calculate the rate change.

(e) Annual rate adjustment method.

(1) Generally. Except as provided for in paragraphs (e)(2)(iii)(B) and (e)(2)(iii)(C) of this section and Section 76.923(o), operators that elect the annual rate adjustment method may not adjust their rates more than annually to reflect inflation, changes in external costs,

changes in the number of regulated channels, and changes in equipment costs. Operators that make rate adjustments using this method must file on the same date a Form 1240 for the purpose of making rate adjustments to reflect inflation, changes in external costs and changes in the number of regulated channels and a Form 1205 for the purpose of adjusting rates for regulated equipment and installation. Operators may choose the annual filing date, but they must notify the franchising authority of their proposed filing date prior to their filing. Franchising authorities or their designees may reject the annual filing date chosen by the operator for good cause. If the franchising authority finds good cause to reject the proposed filing date, the franchising authority and the operator should work together in an effort to reach a mutually acceptable date. If no agreement can be reached, the franchising authority may set the filing date up to 60 days later than the date chosen by the operator. An operator may change its filing date from year-to-year, but except as described in paragraphs (e)(2)(iii)(B) and (e)(2)(iii)(C) of this section, at least twelve months must pass before the operator can implement its next annual adjustment.

(2) Projecting Inflation, Changes in External Costs, and Changes in Number of Regulated Channels. An operator that elects the annual rate adjustment method may adjust its rates to reflect inflation, changes in external costs and changes in the number of regulated channels that are projected for the 12 months following the date the operator is scheduled to make its rate adjustment pursuant to Section 76.933(g).

(i) Inflation Adjustments. The residual component of a system's permitted charge may be adjusted annually to project for the 12 months following the date the operator is scheduled to make a rate adjustment. The annual inflation adjustment shall be based on inflation that occurred in the most recently completed July 1 to June 30 period. Adjustments shall be based on changes in the Gross National Product Price Index as published by the Bureau of Economic Analysis of the United States Department of Commerce.

(ii) External costs.

(A) Permitted charges for a tier may be adjusted annually to reflect changes in external costs experienced but not yet accounted for by the cable system, as well as for projections in these external costs for the 12-month period on which the filing is based. In order that rates be adjusted for projections in external costs, the operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. Projections involving copyright fees, retransmission consent fees, other programming costs, Commission regulatory fees, and cable specific taxes are presumed to be reasonably certain and reasonably quantifiable. Operators may project for increases in franchise related costs to the extent that they are reasonably certain and reasonably quantifiable, but such changes are not presumed reasonably certain and reasonably quantifiable. Operators may pass through increases in franchise fees pursuant to Section 76.933(g).

(B) In all events, a system must adjust its rates every twelve months to reflect any net decreases in external costs that have not previously been accounted for in the system's rates.

(C) Any rate increase made to reflect increases or projected increases in external costs must also fully account for all other changes and projected changes in external costs, inflation and the number of channels on regulated tiers that occurred or will occur during the same period. Rate adjustments made to reflect changes in external costs shall be based on any changes, plus projections, in those external costs that occurred or will occur in the